89-890

No. __-____

IN THE

Supreme Court of the United States

October Term, 1989

HOOPA VALLEY TRIBE AND
HOOPA VALLEY TIMBER CORPORATION
Petitioners,

vs.

RICHARD NEVINS, CONWAY COLLIS, ERNEST DRONENBERG, WILLIAM BENNETT, KENNETH CORY, CALIFORNIA STATE BOARD OF EQUALIZATION AND STATE OF CALIFORNIA,
Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Whether claims that a state timber severance tax (1) frustrates the federal regulatory scheme with respect to Indian reservation timber, and (2) infringes the right to tribal self-government, are cognizable under 42 U.S.C. § 1983.

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Cross-Petitioners Hoopa Valley Tribe and Hoopa Valley Timber Corporation respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on July 28, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1-15)[1]/ is reported at 881 F.2d 657. The decision of the United States District Court for the Northern District of California is unpublished and is reprinted in the Appendix to this Cross-Petition at pages A-1 throuh A-6.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 28, 1989. No petition for rehearing was filed. The petition in Nevins v. Hoopa Valley Tribe, No. 89-686 was filed within 90 days of July 28, 1989, and was received by respondent and cross-petitioners on October 30, 1989. This cross-petition for certiorari is timely filed pursuant to Sup. Ct. R. 19.5. The court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution; 42 U.S.C. §§ 1983 and 1988 (1983); 25 U.S.C. §§ 407 and 1300i-7 (Supp. 1989); General Forest Regulations, 25 C.F.R. Part 163 (1989). The provisions of Titles 25 and 42 of the United States Code are reprinted in the appendix at pages A-7 through A-10. The provisions of the Supremacy Clause and the General Forest Regulations are reprinted at Pet. App. 26 and 27-44 respectively.

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[1]/ Unless otherwise indicated, all references to "Pet. App." are to the Appendix to the Petition for a Writ of Certiorari filed by the State of California in No. 89-686.

STATEMENT OF THE CASE

This action was brought pursuant to 28 U.S.C. §§ 1331, 1343 and 1362. Cross-petitioners generally adopt the statement of the case in No. 89-686 but point out that in the circumstances of this case the Hoopa Valley Tribe was liable for, and paid, amounts equal to the California Timber Yield Tax pursuant to the contracts under which the Tribe's timber was harvested from Reservation trust lands.

The tax and attorney's fees issues were briefed at different times and decided separately by the District Court. In the memorandum decision and order of October 6, 1987, Appendix at A-1 through A-6, the court relied on White Mountain Apache Tribe v. Williams, 810 F.2d 844 (9th Cir. 1984), to reject the Tribe's claim to fees based upon the preemptive effects of 25 U.S.C. § 407 and the General Forest Regulations. The District Court declined to rule on the Tribe's motion for summary judgment based upon the tribal right of self-government but concluded that that claim could not be a "substantial" one because it was not cognizable under 42 U.S.C. § 1983.

The Court of Appeals affirmed the District Court on both the merits and the denial of attorney's fees. While the court agreed with the Tribe that "[t]he right to self-government qualifies as a substantial claim," Pet. App. at 12, 881 F.2d at 661-662, the court concluded that such claims are not cognizable under Section 1983, and therefore could not support a fee award under 42 U.S.C. § 1988.[2/]

[2/] The Tribe waived the right to file a brief in opposition to California's Petition in No. 89-686 by letter to the clerk dated November 17, 1989. By suggesting in that letter that the lower court's opinion on the issues addressed in the Petition warranted summary affirmance, the Tribe did

REASONS FOR GRANTING WRIT

I

THE RULING ON ATTORNEY'S FEES TURNS ON AN ISSUE CURRENTLY AWAITING DECISION BY THIS COURT IN GOLDEN STATE TRANSIT CORP. V. CITY OF LOS ANGELES AND INVOLVES A CONFLICT AMONG FEDERAL AND STATE DECISIONS.

A decision by this Court reversing the Ninth Circuit Court of Appeals in Golden State Transit Corp. v. City of Los Angeles, No. 88-840 (argued October 3, 1989), would remove entirely the basis for the lower court's rejection of the Tribe's fee claim based on 42 U.S.C. § 1988.[3]/ In the interests of uniformity of federal law on the scope of 42 U.S.C. § 1983, eliminating the conflict that currently exists among the Ninth Circuit and the Supreme Courts of Arizona and New Mexico, and fairness to Indian litigants, the lower court's judgment with respect to attorney's fees should be vacated and remanded for reconsideration in light of Golden State Transit Corp.[4]/

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not endorse the lower court's opinion with respect to attorney's fees. This cross-petition is filed so that all rulings below would be available to this Court.

[3]/ 42 U.S.C. § 1988 allows an attorney's fee in actions "to enforce a provision of" 42 U.S.C. § 1983 and certain other statutes. Appendix at A-10.

[4]/ A related attorney's fees issue is among the questions presented in Continental Bank Corp. v. Lewis, 827 F.2d 1517 (11th Cir. 1987), clarified, 838 F.2d 457 (11th Cir.

In Golden State Transit Corp. v. City of Los Angeles, ___ U.S. ___, 109 S. Ct. 1117, 103 L. Ed.2d 180, (February 21, 1989), this Court granted certiorari to the United States Court of Appeals for the Ninth Circuit, limited to the following question:

> Whether in the absence of a direct violation of a federal statute, an allegation that a state statute is preempted by a federal statute is cognizable under 42 U.S.C. § 1983.

The Ninth Circuit had answered that question in the negative in Golden State Transit Corp. v. City of Los Angeles, 857 F.2d 631 (9th Cir. 1988), relying chiefly on their earlier opinion in White Mountain Apache Tribe v. Williams, 810 F.2d 844, cert. denied, 479 U.S. 1060 (1987). Specifically, White Mountain Apache is the basis for the propositions that § 1983 "enforces federal statutory rights only against direct violations of the federal statute in question," 857 F.2d at 635, and that "preemption of state law under the Supremacy Clause -- at least if based on federal occupation of the field or conflict with federal goals -- will not support an action under § 1983." 857 F.2d at 636. These holdings from White Mountain Apache v. Williams, reflected in Golden State Transit Corp., are the two principal reasons for the lower court's refusal to award the Tribe attorney's fees based upon either federal preemption of the state tax or the alternative argument that the right to tribal self-government was secured by the Constitution or laws of the United States. See 881 F.2d at 661, 662, Pet. App. at 11, 12.

That the right to harvest Indian tribal timber free from state actions that frustrate the comprehensive federal

statutes and regulations governing such timber is a right "secured by the Constitution or laws" of the United States, presents a question of substantial importance to the administration of Indian property throughout the nation. It is time now to examine the issue left open by the denial of certiorari in White Mountain Apache, supra, 479 U.S. 1060 (1987), and avoided in Confederated Salish and Kootenai Tribes v. Moe, 425 U.S. 463, 468 n.7, 475 n.14 (1976) (state personal property tax not validly applied to Reservation Indians).

The New Mexico Supreme Court has held, in the context of the Indian Self-Determination and Education Assistance Act, that a similar comprehensive statute and regulatory scheme created rights "secured by the Constitution and laws" and supported an award of fees. Ramah Navajo School v. Bureau of Revenue, 104 N.M. 302, 720 P.2d 1243 (App.), cert. denied, 479 U.S. 940 (1986). See also Lac Courte Oreilles Band v. Wisconsin, 663 F. Supp. 682, 688-90 (W.D. Wis. 1987), app. dismissed, 829 F.2d 601 (7th Cir. 1987) (treaty based rights within §§ 1983, 1988); Chase v. McMasters, 573 F.2d 1011, 1017-18 (8th Cir.), cert. denied, 439 U.S. 965 (1978) (Indian right implicit in 25 U.S.C. § 465 within § 1983). These rulings conflict with the Ninth Circuit's ruling in White Mountain Apache Tribe v. Williams, supra, 810 F.2d 844, and also conflict with an opinion of the Arizona Supreme Court, Central Machinery v. Arizona, 152 Ariz. 134, 730 P.2d 843 (1986), cert. denied, 481 U.S. 1042 (1987) (preemption resulting from Indian traders statute not within § 1983).

Since the Court will clarify the relationship between federal preemption and the rights protected by 42 U.S.C. § 1983 in Golden State Transit Corp. v. City of Los Angeles, supra, cross-petitioners respectfully suggest that this Court should either grant the petition in No. 89-686 and this cross-petition for the purposes of resolving the conflict

among courts and correcting the application of White Mountain Apache Tribe v. Williams to Indian preemption cases, or else vacate the lower court's opinion with respect to attorney's fees in light of the Court's ruling in Golden State Transit Corp.

II

WHETHER THE TRIBAL RIGHT OF SELF-GOVERNMENT IS "SECURED BY THE CONSTITUTION AND LAWS" OF THE UNITED STATES IS AN IMPORTANT QUESTION FOR THIS COURT

This court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government." Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, ___, 107 S. Ct. 971, 975 (1987). But the right of tribal self-government derives its force from legislation and provisions establishing Indian reservations or recognizing tribal authority, not simply from statements in Court decisions.[5/]

[5/] See New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 335 (1983) (goal of promoting tribal self-government "embodied in numerous federal statutes"); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59-60, 71 (1978) (rights of tribal members); Bryan v. Itasca County, 426 U.S. 373 (1976) (reservation property tax immunity); Fisher v. District Court, 424 U.S. 382 (1976) (judicial forum); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172-73 (1973) (reservation income tax immunity); The Kansas Indians, 72 U.S. (5 Wall.) 737, 755-57 (1867) (property tax immunity); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 555-63 (1832) (inapplicability of state law); F. Cohen, Handbook of Federal Indian Law, 231, 267-79) (1982 Ed.).

42 U.S.C. § 1983 offers important protection to this federal right.

While the right of tribal self-government is often a factor in finding federal preemption in Indian affairs, "[t]he self-government doctrine differs from the preemption analysis and is an independent barrier to state regulation." Crow Tribe of Indians v. Montana, 819 F.2d 895, 907 (9th Cir. 1987), aff'd, 484 U.S. 997 (1988) (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136 at 142-43; Crow Tribe of Indians v. Montana, 650 F.2d 1104 at 1110 (9th Cir. 1981)). But if the lower court is correct in concluding that the barrier erected by the tribal right of self-government is not "secured by the laws" of the United States, then Indian tribal rights will be denied complete relief and successful litigants will be denied the reimbursement of attorney's fees that Congress intended to provide in 42 U.S.C. § 1988. Section 1983 and its counterpart, 28 U.S.C. § 1343, provide an important jurisdictional basis for actions involving Indian tribal privileges and immunities, actions often brought by individuals without other access to the courts. The uniquely federal nature of tribal rights has long been recognized to compel their adjudication in federal court. E.g., Oneida Indian Nation of New York v. Oneida County, 414 U.S. 661 (1974) (construing 28 U.S.C. § 1331).

The lower court decision treats the issue whether infringement of tribal self-government is a deprivation of rights within the meaning of § 1983 as case of first impression. The Ninth Circuit resolved that question merely by a reference to an obscure law review article,[6/] and a

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[6/] E. Mettler, A Unified Theory of Indian Tribal Sovereignty, 30 Hastings L.J. 89 (1978). The court also cited two passages from F. Cohen, Handbook of Federal

prior ruling on fishing rights under a treaty having no bearing on the claims below. United States v. Washington, 813 F.2d 1020 (9th Cir. 1987), cert. denied, __ U.S. ___, 108 S. Ct. 1593 (1988).[7]/ But, the lower court's analysis fails: merely because federal laws or treaties operate to preserve some preexisting rights of Indian tribal governments predating the formation of the United States, cannot lead one to conclude that the tribal right of self-government is not "secured" by federal law. Were that the case, then because people were "endowed by their Creator with certain inalienable Rights", The Declaration of Independence (U.S. 1776), those rights, although now reflected in the laws of the United States, would lack protected status under § 1983 simply because the rights pre-dated the Constitution. Clearly, it is the manner in which rights are established in federal law, and not the antecedents of the rights, that should be considered under § 1983. The Court should clarify that attributes of inherent tribal sovereignty that are protected by federal statutes and regulations are "secured" within the meaning of § 1983. See, e.g., Wright v. Roanoke Redev. & Housing Auth., 479 U.S. 418 (1987).

In addition, the lower court's attempt to characterize the tribal right to self-government as "a power, rather than a

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Indian Law (1982 ed.). That treatise however holds that [t]he recognition of tribal self-government [is] embodied in legislation and treaties establishing reservations." Id., at 231; accord id., at 273, 275.

[7]/ But see United States v. Washington, 384 F. Supp. 312, 399 (W.D. Wash. 1974), aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976) (finding jurisdiction for violation of same treaty fishing rights under 28 U.S.C. § 1343 (3) and (4)).

right," Pet. App. at 13, 881 F.2d at 662, and thus excluded from the scope of § 1983, smacks of sophistry. Like the personal liberties/proprietary rights dichotomy rejected in Lynch v. Household Finance Corp., 405 U.S. 538 (1972), the lower court's right/power dichotomy gives no analytical assistance to guide courts around the country. This distinction will be impossible to draw with any consistency or principled objectivity. The Ninth Circuit's own examples of membership, fishing and taxation illustrate that the tribal right of self-government does protect important personal liberties and privileges of individual Indians. Compare Pet. App. at 13, 881 F.2d at 662 with cases cited at n.5, supra.

Finally, the lower court's attempt generally to shut off relief under 42 U.S.C. §§ 1983 and 1988 for deprivations of the right of tribal self-government under the theory that that right is merely protected by federal common law, and not by statutes authorizing creation of Indian reservations or by treaties, simply ignores the specific inquiry that lower courts should make into the precise text of treaties and statutes, construed in the appropriate manner. See generally Washington v. Fishing Vessel Association, 443 U.S. 658, 675-76 (1979) (special rules of interpretation). Federal Indian law is not cut from whole cloth but is based on specific federal enactments creating rights that warrant the remedies of § 1983.

While no treaty is applicable in the present case, this Court has previously construed treaties establishing Indian reservations as having the effect of reserving the right of tribal self-government, e.g., Williams v. Lee, 358 U.S. 217, 220-21 (1959); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172-73 (1973). In many cases, including this

one, special statutes explicitly preserve the right of tribal self-government.[8]/

The lower court's theory that the right of self-government is not secured by the Constitution and laws of the United States will cause tremendous mischief in the law. Unless corrected, it will lead naturally to the question of why the right of self-government could ever operate as a barrier to state incursions on reservations if it does not have behind it the force of federal law. This case raises important questions for this Court.

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[8]/ Section 8 of Pub. L. 100-580, Appendix at A-8, provides: "[t]he existing governing documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed." 25 U.S.C. § 1300i-7 (Supp. 1989). This statute was enacted after the case below was briefed. See also United States v. Kagama, 118 U.S. 375, 382 (1866) (Hoopa Valley Indians retain "power of regulating their internal and social relations"); Donnelly v. United States, 228 U.S. 243, 271 (1913) (statute establishing Hoopa Valley Reservation excludes state authority over crimes involving Indians).

III

CONCLUSION

For the reasons set forth above, it is respectfully submitted that a writ of certiorari should be issued to the Court of Appeals for the Ninth Circuit.

Dated this 29th day of November, 1989.

Respectfully submitted,

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